No. 13,393

IN THE

United States Court of Appeals

For the Ninth Circuit

Fred G. Stevenot, Trustee of Coastal Plywood & Timber Company, a Corporation, Debtor,

Appellant,

vs.

J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick,

Appellees.

Brief of Appellees

Appeals from the United States District Court,
Northern District of California,
Northern Division

Honorable GEORGE B. HARRIS, Judge Presiding

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SUBJECT INDEX

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INTRODUCTORY

This case stems from the summary dismissal of eleven employee-stockholders of Coastal Plywood & Timber Company by one Dyke, its manager, with the authorization of Appellant Trustee but without prior authorization by the bankruptcy court. Pursuant to stipulation by counsel for the Appellees, the Debtor company, and the Appellant Trustee, the district court vacated its general stay order to permit Appellees to file their petition. Appellant filed a motion to dismiss and an answer. Debtor company filed no pleading, but appeared by counsel throughout the trial in support of the Appellees' petition. The trial judge deferred a ruling on Appellant's motion to dismiss until after he had heard the evidence. After a trial lasting five days the court denied the motion to dismiss and entered an Interlocutory Order Reinstating Employees with Back Pay, wherein it ordered that the petitioners (naming them)

> "be and they are hereby reinstated in the jobs held by them, respectively, on December 27, 1951, in the Cloverdale plant of the Debtor Coastal Plywood & Timber Company, or restored to substantially equivalent employment by said Debtor at said plant at equivalent rates of pay, pending the further order of this court.
>
> "It is further Ordered that the Debtor's trustee shall forthwith reimburse each of said petitioners from the Debtor's estate for all wages lost by them, respectively, on and after December 28, 1951, by reason of the lay-off or discharge of said petitioners on or about said date at the rates of pay then being received by them respectively." (Tr., p. 27)

On the following business day, Monday, February 18, 1952, Appellant caused each of the Appellees to be reinstated as an employee, or offered reinstatement as an employee, of the Debtor in conformity with the said Interlocutory Order, but did not and has not paid them the back pay. Appellant has appealed from the Interlocutory Order.

Certain motions were thereafter presented to the trial court and certain orders resulted therefrom, including the order requiring Appellant to file a supersedeas bond, from which an appeal is pending herein. Thereafter, the court, after oral hearings to determine the amounts of back pay to which each of the Appellees was entitled after all proper offsets, entered its Order Reinstating Employees with Back Pay which is the subject of the principal appeal herein.

After the entry of the final order costs were taxed by the clerk and re-taxed by the trial court on motion of Appellees. Appellant has appealed from the order re-taxing costs.

On July 9, 1952, this court granted Appellant's motion for a stay of the order requiring him to file a supersedeas bond whereby he was relieved of compliance with the requirements of that order.

Appellant's Statement of Points upon which he intends to rely on appeal from the interlocutory order assigned the same asserted errors as his Statement of Points on his appeal from the final order, with this exception;—as to the Interlocutory Order, his Statement of Points (Tr., pp. 29-31) filed March 7, 1952, takes no exception to that portion of that order requiring him to reinstate employees in the jobs held by them prior to their discharge, whereas his Statement of Points with respect to the final order (Tr., pp. 79-81) filed June 5, 1952, contains in paragraph number 3 thereof a specific assignment of error as to the reinstatement of Appellees. For reasons more fully discussed hereinafter, we submit that no issue now exists as to that portion of the trial court's orders requiring Appellant to reinstate Appellees in their jobs as employees of Debtor.

STATEMENT OF THE FACTS

The printed record on appeal from the five-day trial is abbreviated. The following facts appear from the findings of the District Court (Tr., pp. 35-53).

The Debtor, Coastal Plywood and Timber Corporation, is a Nevada Corporation with its office and principal place of business at Cloverdale, California. For two or more years each of the Appellees had been the holder of one share of the capital stock of Debtor for which he or she paid the sum of $2500.00. Prior to December 28, 1951, each Appellee had been regularly and continuously employed by Debtor at Cloverdale, California, for periods of time ranging from two years and four months to five years and three months. Each Appellee, except Scott and Tallman, is a creditor of Debtor in amounts ranging from $200.00 to $1650.00 representing money loaned to Debtor. Appellee Norberg is the President and a Director, Appellee Barnhart is the Vice-President and a Director, and Appellee Jackson is a Director of Debtor.

At the time each Appellee purchased his or her share of stock in Debtor Corporation its Articles of Incorporation contained the following provisions:

> "Article IX
>
> "In view of the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with Class 'A' stock ownership, no share of Class 'A' stock may be issued except as follows:
>
> "One share of such stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the

Board of Directors as a future active employee of the Corporation."

It is further provided that: * * *

* * * * * * *

"(d) On behalf of the Corporation the Board of Directors shall have the sole and exclusive option to purchase from any holder of Class 'A' stock who shall fail to report for work within sixty (60) days after the mailing to him, by registered mail, of written call to report for work, or who shall voluntarily or involuntarily cease to be employed by the Corporation by reason of discharge, retirement, resignation, disability or any other reason whatsoever, the share of stock of such holder at the bona fide market value, as hereinafter defined, for a period of 60 days from such failure to report or such cessation of employment. Notice of the exercise of said option and payment to be accomplished in the manner prescribed in subparagraph (a).

"The specific provisions governing discharge, retirement, or disability shall be set forth in the By-laws."

The Articles of Debtor have continued to include the foregoing provisions except that the designation of the shares subject thereto as Class "A" Stock has been eliminated and all of its outstanding stock including that held by Appellees is now subject to said provisions.

At the time each Appellee purchased his or her share of stock in Debtor Corporation its by-laws contained provisions relating to the tenure and job security of stockholder employees including the following:

"Section 2. Discharge:

"A Class 'A' stockholder employee may not be discharged except with the approval of the majority of the

> members of the Board of Directors who are elected by the Class 'A' stockholders. If the Class 'A' stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class 'A' stockholders called for the purpose in accordance with the provisions of the By-laws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective."

The court below found that the said provisions were intended to afford job security and job tenure to Appellees and to constitute valid and enforcible agreements between Debtor and each Appellee, in reliance upon which each Appellee purchased his stock and accepted employment and has since continued such employment; that prior to purchasing said stock each Appellee was induced to and did move his or her residence to Cloverdale; and that each Appellee, except Tallman and Gladys M. Zimmermann, has purchased or is purchasing a home in Cloverdale in reliance upon continued employment by Debtor.

On September 10, 1950, the By-laws of Debtor were amended by vote of majority of its shareholders to, among other things, eliminate the above-quoted provisions relating to job security and job tenure. At the time of such amendments Debtor was indebted to the Bank of America and the R.F.C. for approximately $2,600,000 secured by mortgages on its property and assets, and such amendments were unequivocably required by said bank and the R.F.C. as the condition of continuing said loans and future financing, and were not intended to impair and did not impair the job security and job tenure provisions of the agreements between Debtor and Appellees.

On November 1, 1951, the District Court appointed Fred G. Stevenot Trustee of Debtor. On December 5, 1951, said Stevenot employed Martin Dyke as Manager of Debtor in charge of its Cloverdale plant. Prior to the appointment of the trustee Dyke had been employed as General Manager of Debtor since October, 1949.

On December 20, 1951, said Stevenot filed his sworn report to the court in said proceedings reporting, among other things, that he had retained in the employee of Debtor such employees in addition to Dyke as he, the said Stevenot, determined necessary to continue the profitable operation of its business. At that time all of the petitioners were regularly employed. On December 28, 1951, without any prior notice or warning to petitioners Dyke laid off each of them, and thereafter on or about February 1, 1952, upon service on counsel for the trustee of the petition for reinstatement filed herein, said Dyke finally determined that petitioners were permanently discharged from all further employment by Debtor solely by reason of their having instituted their petition to the Court for redress.

Petitioners were so laid off and discharged without authorization by the court. Said lay-off and discharge was as to each petitioner wholly without cause, sufficient reason or justification in the proper conduct and management of Debtor's business and estate, was arbitrary and capricious, and in violation of their rights, contrary to sound industrial relations practice, and was due solely to the fact that Dyke personally opposed petitioners in the exercise of their statutory rights as shareholders, officers or directors of Debtor Corporation in matters totally unrelated to the proper administration and preservation of Debtor's business and estate by the court's trustee. Reinstatement of petitioners with restitution of earnings lost by reason of such wrongful lay-off and discharge will be for the best interests of the Debtor.

All of the petitioners were reinstated or offered reinstatement on February 18, 1952. The amount of wages lost by petitioners varied from $350.74 to $508.60 and aggregated as to all petitioners $4,887.62 for which amount Appellant was ordered to reimburse them forthwith. No part of such amounts has been paid.

ARGUMENT

The Findings of Fact Are Conclusive.

The findings in the final Order Reinstating Employees with Back Pay (Tr., pp. 35-53) are conclusive as to all facts found therein.

Federal Rules of Civil Procedure, Rule 52(a) provides—"findings of fact shall not be set aside unless clearly erroneous."

In *United States v. Aluminum Co. of America* (1945, C.C.A. 2d), 148 F.2d 416, the court, in applying Rule 52(a), says at page 433:

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, one accepted rule is that they 'must be treated as unassailable'." (citing cases) * * * "Since an appellate court must have some affirmative reason to reverse anything

> done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

Applied to this case, this means that the findings below are conclusive as to such issues of fact, as the reasons which led Appellees to become stockholder-employees, the intent and purpose of Dyke in discharging them, the reasons for such action, and the effect of such action upon the proper administration of Debtor's affairs in these reorganization proceedings.

The Court in These Reorganization Proceedings Had the Power and Duty to Order Appellant Trustee to Correct His Improper and Unauthorized Action.

The Appellees petitioned the Bankruptcy Court for reinstatement with back pay on the premise that their discharge without proper cause was a breach of and violation of their contracts of employment as contained in the Articles and By-laws of Debtor Company at the time they purchased their stock and became employees; and that the subsequent amendment of the By-laws, whereby the applicable provisions were changed was not intended to abrogate or impair their rights to job security and job tenure, and could not, on constitutional grounds, be so applied. The court heard evidence on the issue and found the "agreements constituted by the Debtor's articles of incorporation and by-laws as they existed at the time petitioners purchased their said stock were not impaired or abrogated in any respect by said amendments" (Tr., p. 48).

At the trial it also appeared from the records in these Chapter X proceedings—(1) that the order appointing Appellant as trustee contains specific limitations upon his authority, namely, that he "perform all things that he shall be directed by the court or judge to do," and that the exercise of his power be "subject always to the direction and control of the judge" (Tr., p. 4); that on or about December 20, 1951, Appellant had filed a sworn report to the court in which he had reported that he had retained in the employee of Debtor company such employees as he determined necessary to continue the profitable operation of the business of said company (Tr., p. 50). As to the discharge of Appellees on December 28, 1951, the court found—"no application was made to the Court for specific authority to lay off or discharge petitioners, or any of them, and they were so laid off and discharged without specific authorization by the Court" (Tr., p. 51).

The court was thus confronted with a new issue, namely, regardless of whether Appellees had enforceable rights as employees or stockholders of Debtor, *was the unauthorized discharge of eleven employee-stockholders, including the president, the vice-president, and three directors of Debtor, without cause and contrary to sound industrial relations practice, and subjecting them to loss of their stock during the reorganization proceedings, beneficial or harmful to the proper administration by the court of the business of Debtor company?* The court specifically found against Appellant and in favor of Appellees on this issue (Tr., pp. 51, 52).

When it appeared from the evidence presented that the discharge of the Appellees had not been authorized by the court we asserted there, as we do here, that the court had the power and was under the duty to refuse to approve such action and to order Appellant, as its appointed officer, to reinstate employees forthwith and to make them whole for wages lost by reason of his unauthorized and improper action.

A trustee in reorganization proceedings is an officer of the court, under its control, and in important matters he can act only with the approval of the court.

Section 102 of the Bankruptcy Act (11 U.S.C.A. Sec. 502) provides in effect that the provisions of other Chapters of the Act apply to proceedings under Chapter X insofar as they are not inconsistent with or in conflict with provisions of Chapter X. Since no definition of "officer" appears in Chapter X, a trustee in a Chapter X proceeding is an officer of the court by the definition of that term contained in Section 1(22) of the Bankruptcy Act (11 U.S.C.A. Sec. 1(22)) wherein a trustee is classified with the clerk, marshal, receiver, custodian, and referee as an officer.

The extent of the court's control over its appointed trustee has been discussed in a number of cases. In the early case of *In re Howard* (1904, D.C. N.D. Cal.) 130 Fed. 1004, a bankruptcy court, in a summary proceeding, ordered its trustee to pay over money to petitioner, saying at page 1006:

> "The trustee is an officer of the court and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office." (The *Howard* case was affirmed on appeal (C.C.A. 9th) 135 Fed. 721).

In *Pearson v. Higgins* (1929 C.C.A. 9th), 34 F.2d 27, the court said, at page 29: "The trustee is an officer of the court, as fully under its control as would be a receiver."

In *Imperial Assurance Co. v. Livingston* (1931 C.C.A. 8th), 49 F.2d 745, the court said, at page 748:

> "* * * the trustee can, in important matters, act only with the approval of the court and he must keep the court fully and frequently advised of his action as trustee * * * all of this is because of and emphasizes the fact that he is an officer of the court."

And again, at page 749

> "This situation, as an officer of the court administering property in the custody of the court, is the woof, into which all of his status, duties and powers are woven."

Although the *Imperial* case involved an ordinary bankruptcy proceeding, it was cited with approval in *Western Pacific R. Corporation v. Baldwin* (1937 C.C.A. 8th), 89 F.2d 269, which involved a reorganization proceeding under Section 77 of the Bankruptcy Act. In this case a question arose as to whether a voting trust agreement had been extended. The extension had been requested by one of the trustees but without the authority of the court appointing him. The request was held ineffective unless and until authorized by the court. In so holding the court pointed out that the trustees were officers of the court which had appointed them and were subject to its control, citing the *Howard* and *Imperial* cases, *supra*. The trial court was directed to determine whether or not such unauthorized action by a trustee should be ratified. The court stated in this connection (p. 273):

> "We think that the question whether the act of Mr. Baldwin in requesting an extension of the voting trust agreement should be ratified by the court and the voting trust agreement extended is still open for determination, and that the court below, after notice to all interested parties, should determine that question, the answer to which will depend, of course, upon whether or not it is for the best interests of the trust estate, and of the creditors and stockholders interested therein, that the voting trust continue."

The court below found (Tr., p. 52), and its finding is conclusive, that *the reinstatement of Appellees with restitution of the earnings lost by them by reason of the wrongful lay-off and discharge will be for the best interests of the Debtor.*

In *Freeman Coal Mining Corporation v. Burton* (1944 Ill.), 58 N.E.2d 589, the Supreme Court of Illinois had before it a question of whether a trustee's action in former proceedings for the reorganization of a corporation under Section 77B of the Bankruptcy Act, precluded establishment of a constructive trust in certain property alleged to belong to the Plaintiff. Plaintiff corporation was the successor to the corporation which had gone through reorganization and had received from the trustee the assets of debtor. Later it was discovered that the president of debtor, who was kept as an assistant to the trustee after his appointment, had represented to the trustee that he was the owner of the lands in question and, as a landlord was entitled to certain royalties therefrom. He misrepresented his title, for in fact the lands belonged to the Debtor Corporation. The trustee, believing this representation, paid the royalties and did not dispute the title to the land. Defendant argued that plaintiff as successor to the rights of trustee was estopped to assert title to the lands in question. The court brushed aside this argument with the statement that the trustee was without power to create an estoppel against a bankruptcy estate or its successor in interest, *in the absence of an order of the court authorizing such action.* The court observed that the trustee was an officer of the court as fully under its control as would be a receiver, citing the *Imperial* case, *supra.*

The foregoing authorities clearly show that a trustee is an officer of the court appointing him; that he can act in important matters only with the approval of the court; and that his unauthorized actions are not binding either upon the court or upon third parties affected thereby.

Applied to the present case, it can scarcely be contended that the unauthorized action of the trustee in permitting Dyke to discharge 11 stockholder employees including the President, the Vice-President and 3 Directors of Debtor Corporation, 9 of whom were also creditors of Debtor, and thereby subjecting them to loss of their stock during the reorganization proceedings, was not an action in an important matter, nor that the court which had appointed the trustee did not have the *power* to rescind such action. The action of the Trial Court in rescinding such action is assigned as error in Appellant's Statements of Points on Appeal (Tr., pp. 31, 81, Opening Brief, p. 9) in that the court substituted its judgment for that of the trustee. Appellant's Opening Brief does not question the court's authority to do so, nor does it contain any discussion of the alleged error. We think the answer to a contention that a bankruptcy court erred in substituting its judgment for that of its appointed trustee is to be found in the axiom—"A stream cannot rise higher than its source."

Reinstatement with back pay is the statutory remedy for discriminatory discharges. *National Labor Relations Act, Sec. 10c* (29 U.S.C.A., Sec. 160(c)).

It is the usual remedy granted under implied powers conferred by the *Railway Labor Act* (45 U.S.C.A., Sec. 151 et seq.); and back pay is awarded by courts as damages for breach of employment contracts.

> *Moore v. Illinois Central R. Co.* (1940), 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089;
>
> *Broady v. Illinois Central R. Co.* (1951, C.C.A. 7th), 191 F.2d 73;
>
> *Roberts v. Western Pac. R. R. Co.* (1951), 104 C.A.2d 816.

We think this court may take judicial notice of the fact that reinstatement with back pay is the usual and customary form of redress for wrongful discharge applied by courts, administrative agencies, arbitrators and general industrial relations practice.

The Interlocutory and Final Orders of the trial court constituted a lawful and proper exercise of his authority over Appellant trustee as an officer of the court. We respectfully submit that, upon this ground alone, the principal appeals herein must be dismissed.

The Court Properly Found That Subsequent Amendments to the By-laws Did Not Abrogate Nor Impair the Job Security and Job Tenure Provisions of Appellees' Contracts with Debtor.

Appellant concedes that the contract between Debtor and Appellees contained in the by-laws at the time they became stockholder-employees was not "complied with in the present case" (Op. Br., p. 12). He contends, however, that their petition "ignores" the fact that the by-laws were amended on September 10, 1950 to eliminate the job security and job tenure provisions; and further, that since such amendment he is unable "to perceive how Appellees can claim any rights whatsoever" (Op. Br., p. 13). The answer is, far from ignoring the amendment of September 10, 1950, Appellees set it up in their petition (Tr., p. 17); and contended, as the court found, that said amendment was not intended to impair or abrogate and did not impair nor abrogate the agreements between Appellees and Debtor Corporation.

Said amendment was adopted by a *majority* vote of the stockholders (Tr., p. 145). Appellant does not contend that any of the Appellees *voted for* the amendment. It cannot be assumed, therefore, that the amendment of September 10, 1950, was assented to by any of the Appellees.

Provisions in corporate by-laws may be divided, generally speaking, into two classes: (a) those that are merely regulations governing the conduct of the internal affairs of the corporation which may be repealed, altered or amended by majority or other vote as specified by the by-laws themselves or by statute, and (b) provisions which create vested or contract rights which cannot be repealed or changed without the consent of the shareholders whose rights are affected.

Bornstein v. District Grand Lodge No. 4 (1906), 2 C.A. 624;

Schack v. Supreme Lodge (1908), 9 C.A. 584;

State v. San Francisco Savings and Loan Soc. (1924), 66 C.A. 53;

Bechtold v. Coleman Realty Co. (1951), 79 A.2d 661;

8 *Fletcher, Cyclopedia of Corporations* (permanent edition), Sec. 4177.

The court found in effect that the discharge provisions in the by-laws of Debtor fall within class (b) above.

While none of the foregoing cases dealt with an alteration or change of corporate by-laws pertaining to employee relations of stockholder-employees, the *Bornstein* and *Schack* cases, *supra,* dealt with the rights of members of mutual benefit corporations. In both cases, by-laws with respect to insurance benefits had been altered materially without the consent of the members although such changes appeared to have been adopted by a majority of the members in accordance with corporate charters or by-laws. In each case it was held the amendments were ineffective to abrogate or impair the contract rights of a member without his consent.

In the *Bechtold* case, *supra,* it was held that a corporate by-law providing that none of its stock should be sold or transferred by any stockholder to any person not already a stockholder until optioned to the corporation or the other stockholders in proportion to their stockholdings, was a contract designed to vest a property right among the stockholders *inter se* which could not be changed without the consent of minority stockholders.

Here, as in the *Bechtold* case, the by-law provisions in question were clearly intended to create vested rights among stockholder-employees which could not be changed without their consent. Moreover an analogy between Debtor and mutual benefit corporations exists. Debtor Corporation attempted to assure job security benefits to its stockholder-employees to the mutual benefit of the corporation and such stockholder-employees. This fundamental purpose is found in Article IX of its articles (Tr., p. 36-41), which have not been changed since Appellees became stockholder-employees. The by-law provisions in question constituted a further implementation of this general plan.

We submit that said by-law provisions constituted vested rights *inter se* among the stockholder-employees of Debtor which could not be eliminated without their consent, even had it been the purpose of the amendment so to do.

The burden of proving that Appellees consented to the elimination of their job security rights rested in Appellant.

> *Johnson v. Grand Fountain of United Order of True Reformers* (1904), 47 S.E. 463;
>
> 8 *Fletcher,* Sec. 4188, p. 720.

ANALYSIS OF APPELLANT'S OPENING BRIEF

Appellant argues only three points with respect to the interlocutory and final orders reinstating Appellees with back pay, which may be summarized as follows: (1) Appellees, at the time of discharge, had no contractual rights because the by-law provisions which gave them job security and were in effect when they purchased their stock and became employees had been eliminated, (2) Appellees failed to comply with "their contracts" by executing option agreements on their stock prior to their discharge (as employees) and may not complain of a *subsequent* breach, and (3) Appellees' petition is an attempt to specifically enforce personal service contracts.

In view of the preceding discussion of the amendment to Debtor by-laws, we see no need to discuss further the Appellant's first contention. We will proceed to the others.

There Was No Issue Before the Trial Court as to Antecedent Breach of Contract by Appellees.

Having first argued that Appellees had no contract with Debtor at the time they were discharged, Appellant next contends that Appellees "had failed to comply with their contracts" and may not complain of a subsequent breach by Debtor (Op. Br., p. 21). The latter contention—that Appellees breached their contract—is wholly inconsistent with and opposed to the former—that Appellees had no contract—and is an about face from Appellant's position before the Trial Court.

Appellees alleged in their petition (Tr., pp. 10-18) that the job security and job tenure provisions of Debtor's Articles and By-laws constituted valid and binding agreements between Debtor and each of them and that the lay-off or discharge of Appellees constituted a breach of said agreements. Appellant's answer (Tr., p. 21) specifically denied "each and every one" of these allegations.

Appellees further alleged on information and belief (Tr., pp. 14-15) specific reasons for their lay-off or discharge by Dyke including as one of such reasons the fact that they had executed option agreements on their stock to one Hampton and that the execution of said option agreements was opposed by Dyke (Tr., p. 14). Appellant's answer denied this allegation on information and belief (Tr., p. 21) and further denied (Tr., pp. 21-22) that Appellees were discharged "for any or all" of the reasons specified.

Thus no issue as to antecedent breach of contract by the execution of the option agreements was presented by the pleadings. The findings in the final order contained nothing about it. Appellant filed (but has not included in the printed record) proposed amendments to such findings, which amendments contained nothing with respect to such options. The fact is Appellant maintained throughout the trial that Appellees had no contract.

It appeared from Debtor's Exhibit G, which Appellant has included in the presented record (Tr., pp. 115-140) that a suit involving the validity and effect of the option agreements executed by Appellees and others was filed in the State Court on August 27, 1951—prior to the time these reorganization proceedings were commenced. Appellant was free to raise before the Trial Court a defence of antecedent breach of contract had he been so advised. Instead he took an exactly opposite position. He cannot now present the issue for the first time and contend that the Trial Court committed error as to an issue which was not before it.

We assume the issue of antecedent breach was not raised at the trial for any or all of several reasons, viz.: (1) The option agreements, under the circumstances of their execution, did not violate Appellees' agreement with Debtor. (2) The inconsistency of such a contention with Appellant's theory that Appellees had no contractual or other rights as employees which prevented him from discharging them. (3) The execution of the option agreements was not the real reason for the discharges, or even if it were, Appellant was loath to shock the conscience of the court by contending that the signing of options on their stock was a proper ground for discharging Appellees as employees of Debtor.

SPECIFIC PERFORMANCE

The Appellant contends here, as in the trial court, that in petitioning for reinstatement of these employees we were seeking specific performance of contracts for personal services in contravention of Sec. 3390(2) of the California Civil Code.

There are several reasons why this contention is not and was not valid:

1. The Issue as to Reinstatement Is Now Moot.

The record shows that "all of the petitioners were reinstated as employees of the Debtor company, or offered reinstatement as employees of the Debtor company, on February 18, 1952" (Findings, Tr., p. 52); and that such action "will have no adverse or harmful effect whatever upon the proper administration and preservation of the Debtor's business and estate by the Court's trustee, but on the contrary such reinstatement with restitution of the earnings lost by petitioners by reason of said wrongful layoff and discharge will be for the best interests of the Debtor company" (Findings, Tr., p. 52).

In the face of this record, no issue now exists either as to whether the trial court had the power to order, or in the proper exercise of its powers ought to order, such reinstatement. It is well settled that a reviewing court will not pass upon an issue which, for any cause, has become moot. A statement of this rule which is often quoted is that contained in the opinion of Judge Van Fleet in *Southern Pacific Co. v. Eshelman* (N.D. Cal., 1914), 227 Fed. 928, at p. 932:

> "To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court,

upon the fact appearing, to dismiss it." (Citing several decisions of the United States Supreme Court)

See also 1 C.J.S. 1017, which is quoted in

People v. Collins (1950), 97 C.A.2d 552, at p. 554;

Weber v. Nasser (1930), 210 Cal. 607.

Nor does the operation of this rule impose any hardship on appellant. These appellees had been discharged "wholly without cause" (Findings, Tr., p. 51) and "said lay-off and discharge was arbitrary and capricious as to each and all of said petitioners and was in violation of their rights and contrary to sound industrial relations practice * * *" (Findings, Tr., p. 51); and this case does not directly, nor even remotely, involve any issue as to the present or future rights of Appellant to discharge or otherwise discipline these employees *for cause.*

The issue as to reinstatement which was presented to the trial court has since been wholly removed from the case and any order of this court with respect to such issue would be futile.

2. This Was Not an Action for Specific Performance Within the Scope of Section 3390 of the California Civil Code.

We do not question the application of the rule expressed in Sec. 3390 to any situation in which the reasons for that rule, as stated in *Poultry Producers, etc. v. Barlow* (1922), 189 Cal. 278, 288, and quoted at p. 22 of Appellant's brief, apply. None of these reasons (involuntary servitude, public policy and impossibility of enforcing compliance) apply to the situation presented in this case. This was not a suit for specific performance or for an injunction. It was a petition to the bankruptcy court in the reorganization proceedings for an order directing its trustee to correct an action authorized by him but without authorization by the court, by reinstating these employees and paying them wages lost by reason of such action. The bankruptcy court was confronted with no problem as to involuntary servitude, public policy, or impossibility of enforcing compliance with its order.

It is now well settled that specific performance, or the correlative suit for an injunction, is a proper remedy for the breach of a collective bargaining agreement.

See No. 156 *A.L.R.* 652, 662;

Montaldo v. Hires' Bottling Co. (1943), 59 C.A.2d, 642;

California Labor Code, Sec. 1126 (Adopted 1941);

National Labor Relations Act, Sec. 10(c) (Adopted 1935).

Prior to the adoption of the California statute in 1941, the rule had been applied by California courts. One of the first cases was called to our attention at the trial by the learned trial judge, who had participated in it as counsel for the employers involved. This was the celebrated case of *Weber v. Nasser, supra,* which involved a suit by a labor union to enforce by injunction the provisions of a collective bargaining agreement. The trial court sustained a general demurrer to the complaint and dismissed the action on the ground that the agreement involved personal services and was not subject to specific enforcement. On appeal the district court of appeal reversed (286 Pac. 1074) and subsequently the Supreme Court, without discussing the issue, dismissed the action on the ground that the issues had become moot by prior expiration of the collective bargaining agreement. While the action of the Supreme Court had the effect of nullifying the decision by the District Court of Appeal, it is significant that as early as 1930 a California appellate court had established the right to specific performance of a collective bargaining agreement.

Again, in 1940, a year before the California statute, an injunction was issued against breach of a collective bargaining agreement. *Shop 'N Save v. Retail Food Clerks' Union,* (Cal. Super. Ct. 1940), 2 *Labor Cas,* 18,673.

In 1941 the California Legislature set the matter at rest by the passage of Section 1126 of the *Labor Code* reading as follows:

> "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

We concede that the agreement between Debtor and its stockholder-employees does not meet the exact terms of the above definition of a "collective bargaining agreement" because there was no union or "labor organization" involved, but we do contend that the agreement here otherwise is comparable to a collective bargaining agreement. It applied uniformly to all stockholder employees. It was an agreement mutually beneficial to Debtor and such stockholder employees. It covered not only job security and tenure but also wage rates, vacations, retirement and leaves of absence (Tr., pp. 42-46), all of which are commonly embraced in collective bargaining agreements. Therefore it is difficult to imagine any justification for the application of Section 3390 of the California Civil Code to the agreement here involved when such provision is inapplicable both by statute and judicial interpretation to collective bargaining agreements.

3. The Articles of Incorporation of Debtor Provided for Disposition of Appellees' Stock Upon Their Discharge as Employees, and the Court Had Power to Protect Their Rights as Stockholders.

Apart from their position as employees or officers or creditors of Debtor, Appellees were stockholders of Debtor corporation. Article IX in its Articles of Incorporation (quoted in the findings, Tr., pp. 36-41) provided for the disposition and pricing of the share of any holder "who shall voluntarily or involuntarily cease to be employed by the corporation by reason of discharge—." Shareholders, of course, have rights in proceedings for the reorganization of a corporation under Chapter X. Certainly their rights as shareholders are the special concern of the Bankruptcy Court. It can hardly be contended that the court had no power to protect Appellees against loss of their stock during reorganization proceedings by unauthorized action discharging them as employees.

SUPERSEDEAS BOND

When Appellant failed to comply with the provision of the Interlocutory Order requiring him "forthwith" to reimburse the Appellees from Debtor's estate for their lost wages, they moved for an order requiring him to file a supersedeas bond as required in Rule 73d of the Federal Rules of Civil Procedure (Tr., pp. 31-34), citing in support of their motion the decision of this court in *Pacific Coast Casualty Co. v. Harvey* (1918, C.C.A. 9th), 250 Fed. 952. The Trial Court, after a hearing in which it determined the amount of wages lost less all proper offset, and prior to the entry of its final order, ordered Appellant to file a supersedeas bond in the amount of $10,000. Appellant petitioned this court for a stay of that order. A stay was granted on July 9, 1952. Appellant's contention is that Section 25(b) of the Bankruptcy Act (11 U.S.C.A. Sec. 48b) relieves him from the necessity of furnishing a supersedeas bond. This court had the provision before it as it then read in the *Harvey* case, *supra,* and held that the exemption of trustees applied to cost bonds only and did not relieve a trustee in bankruptcy from the obligation to post a supersedeas bond. At the time of the *Harvey* decision the provision was contained in Section 25(c) of the Bankruptcy Act, and read—

> "Trustees shall not be required to give bond when they take appeals or sue out writs of error."

Now the provision is contained in Section 25(b) of said Act and reads

> "Receivers and trustees shall not be required in any case to give bond when they take appeals."

Appellant appears to contend that the amendment has changed the rule announced in the *Harvey* case. We most strongly maintain that this is not true; and that the Trial Court properly ordered Appellant to give a supersedeas bond to protect Appellees pending the outcome of this appeal against ultimate loss of their wages.

The question of whether trustees in bankruptcy are required like other litigants to file supersedeas bonds when they take appeals is a point which will seldom arise for the reason that a trustee usually complies with the orders of the court appointing him, particularly those dealing with administrative expense in the reorganization proceedings. However, since the purpose of such a bond in this case—protection of Appellees pending this court's decision—will have passed when this court decides this case, this court may if it chooses refuse to rule further upon the point.

At this late stage of this case it seems unnecessary to argue the point further than to point out to this court that the interim order of the trial judge was, in our opinion, correct and in conformity with the rule established by this court in the *Harvey* case, *supra*.

THE ORDER RETAXING COSTS WAS WITHIN THE DISCRETIONARY POWERS OF THE COURT IN SUCH MATTERS AND WAS ENTIRELY CORRECT AS TO EACH ITEM.

Appellees filed a cost bill aggregating $207.20. The clerk sustained Appellant's objection to the principal items and taxed costs in the total sum of $4.00. On motion, the trial court, after a hearing (Tr., pp. 89-105), retaxed costs in the amount of the cost bill as filed.

Appellant urges here, as in the court below, that two items should have been disallowed. One item was "reporters fees—Transcript of the Remarks of the Court at Conclusion of Argument, Friday, February 15, 1952—$4.00," and the other was "witness fees and mileage—$199.20." As to the latter item Appellant now apparently concedes a sum of $16.60 was proper (Op. Br., p. 27) so that the present objection applies to the sum of $182.60 representing witness fees and mileage for the eleven Appellees in attending a supplementary court hearing on May 1, 1952.

Before examining these items we wish to point out that the Appellant's contention is "the District Court erred" (Tr., p. 27) and not that the allowance of these items constituted an abuse of the District Court's discretion. There is of course a distinction between error and an abuse of discretion. See 1 *C.J.S.* 402, et seq.

Taxable costs are fixed by the *Judicial Code* (28 U.S.C.A. Sec. 1920) and the matter of assessing costs is within the discretion of the District Court.

> *United States v. One 1949 GMC Truck* (1950 D.C. Va.), 104 Fed. Supp. 34;
>
> *Spiritwood Grain Co. v. Northern Pacific Ry. Co.* (1950 C.C.A. 8th), 179 F.2d 338.

The first item represents the cost of transcribing the statement of the trial judge at the conclusion of the trial in which he announced his oral findings of fact and requested Appellees' attorney to prepare proposed written findings of fact. It was obtained by the attorney for Appellees to enable him to prepare the written findings in accordance with the court's oral statement. It was "necessarily obtained for use in the case" within the meaning of the statute cited next below.

By the amendments to the *Judicial Code adopted in 1948* a district court is expressly vested with discretionary power to tax as costs

> "Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." (28 U.S.C.A. Sec. 1920(2))

As we pointed out to the court below (Tr., p. 100) the cases cited on page 28 of Appellant's Opening Brief, and in the Trial Court, arose under the different provisions of the earlier statutes. Any value they once had as precedent has been washed away by the new statute.

The next item covers witness fees and mileage from Cloverdale, California, to San Francisco of twelve witnesses. One of these, Wesley Cross, who was a foreman in Debtor's plant, covered his appearance under subpoena at the trial in February. Appellant apparently now concedes, as he must, that the allowance of this item was proper. Appellant objects to the court's allowance of the other witness fees and mileage on the ground that the witnesses, (1) were not subpoenaed by the trustee and (2) "they were all testifying in their own behalf."

Appellant's first point—that the witnesses appeared voluntarily and without subpoena—is entirely without merit. Witness fees are properly taxed as costs where the witnesses appeared voluntarily and without subpoena.

> *The Petroleum No. 5* (1930 D.C. Tex.), 41 F.2d 268;
> *Spiritwood Grain Co. v. Northern Pacific Ry. Co. supra.*

Nor does the contention that this item represents fees and mileage to witnesses testifying in their own behalf correctly present the picture. No costs were claimed for the appearance of the eleven Appellees during the trial. The item covers their appearance on May 1, 1952, in a supplementary proceeding. Before it could enter its final judgment the court necessarily was required to determine the amounts of wages lost by each Appellee from the date of discharge, December 28, 1951, to the date of their reinstatement, February 18, 1952, less any proper offset for wages earned elsewhere during such period. The court was further required before entry of the judgment to pass upon Appellant's contention as to mitigation of actual loss of earnings. This was necessary in order to determine the proper amount of the final judgment to be entered in favor of each Appellee. At the commencement of the hearing on May 1, 1952, George Herrington, Esq., one of the attorneys for Appellant, announced in open court that Appellant was then ready to stipulate to the amounts of wages lost by each Appellee less all proper offset. This stipulation was accepted. Mr. Herrington then proceeded to call each of the eleven Appellees to the witness stand *as a witness for Appellant* and examine each of them with respect to his efforts to obtain other employment during the period in which he was discharged from Debtor's plant, in an effort to establish mitigation or lessening of the amounts to which each Appellee was entitled. (The foregoing statement of facts substantially appears from the transcript of the hearing on the motion of retax costs contained in pages 89-105 of the Printed Record filed herein). It is thus clear that Appellees were allowed witness fees and mileage while testifying as witnesses for Appellant and against their own interests.

We have no quarrel with the general rule stated in the cases cited at page 29 of Appellant's Opening Brief. A party litigant is not ordinarily permitted to claim witness fees and mileage for appearance at a trial of his case. This rule is based upon the fact that the litigant is appearing in his own interest and because of his interest in the management of his case. In one of the cases cited by Appellant, *The Petroleum Number 5, Supra*—a litigant was allowed a witness fee under the facts there presented.

Under the new statute (28 U.S.C.A. Sec. 1920 (3)) the allowance of these witness fees and mileage was within the sound discretion of the Trial Court and can be reversed here only upon a showing of an abuse of discretion.

Spiritwood Grain Co. v. Northern Pacific Ry. Co., supra.

Even prior to the new statute this court held in *Kirby v. United States* (1921 C.C.A. 9th), 273 Fed. 391 that the Trial Court committed no abuse of discretion in taxing as costs mileage and fees of witnesses who did not testify.

Since the item covers fees and mileage of Appellees while testifying in a supplementary proceeding as witnesses for Appellant and against their own interests the allowance of witness fees and mileage to them was entirely proper and under no circumstances could it be an abuse of the discretion vested in the Trial Court.

SUMMARY

The four appeals herein should be dismissed for the following reasons:

1. The findings of the District Court are conclusive as to the facts stated therein.

2. A District Court in proceedings for the reorganization of a corporation under Chapter X of the Bankruptcy Act has general control over the administration of the affairs of a debtor and after hearing all interested parties it may refuse to approve an unauthorized action by its appointed trustee.

3. The District Court properly found that the discharge of Appellees was without proper cause and in violation of

their rights and its order reinstating them with restitution of lost wages constituted the proper form of redress.

4. This Court will refuse to consider any issue which was not presented to the District Court.

5. No issue now exists as to the reinstatement of Appellees pursuant to the Interlocutory Order.

6. The case presents no issue as to specific performance of personal service contracts.

7. A supersedeas bond is of no use at this stage of the proceedings.

8. The order retaxing costs was within the discretion of the District Court and was entirely correct.

Respectfully submitted,

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